



DAN MORALES  
ATTORNEY GENERAL

Office of the Attorney General  
State of Texas

January 9, 1991

Mr. Larry W. Schenk  
City Attorney  
City of Longview  
P.O. Box 1952  
Longview, Texas 75606-1952

OR91-024

Dear Mr. Schenk:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 9660. The information in question consists of disciplinary, qualification, and performance records for five Longview police officers.

We have considered the exceptions you claimed, specifically sections 3(a)(1), 3(a)(2), 3(a)(3), 3(a)(7), 3(a)(8), and 3(a)(11), and have reviewed the documents at issue.

Your exhibit A consists of performance evaluation reports for four officers. You assert that these records are excepted from required public disclosure by section 3(a)(11) of the Open Records Act. A previous determination of this office, Open Records Decision No. 538 (1990), a copy of which is enclosed, resolves your request with respect to Exhibit A. You may withhold the information in your exhibit A. In addition, you assert that certain items in other exhibits are excepted by section 3(a)(11). We have marked the portions of Exhibits C, E, F, H, J, K, L, and M which are excepted from disclosure under section 3(a)(11).

You advise that the subject matter of the information in your exhibits F and G relates to pending criminal litigation, and assert that the information is excepted from public disclosure by section 3(a)(3). It would be anomalous to require the city to disclose information which the prosecuting attorney determines should be withheld. Accordingly, to the extent determined necessary by the prosecuting attorney, the information in Exhibits F and G may be withheld. Enclosed is a copy of Open Records Decision No. 551 (1990). Please note the discussion on page four of Open

Records Decision No. 551 regarding the duration of the litigation exception.

Exhibits H and I consists of a witness statement. this statement may be withheld under the informer's privilege aspect of sections 3(a)(1) and 3(a)(8). See Open Records Decision No. 515 (1988).

You assert that several items among the exhibits submitted for our inspection are excepted from required public disclosure by common-law or constitutional privacy as incorporated into the Open Records Act by section 3(a)(1).

The constitutional right of privacy protects the most intimate aspects of human affairs. Ramie v. City of Hedwig Village, 765 F.2d 490, 492 (5th Cir. 1985); see also Klein Indep. School Dist. v. Mattox, 830 F.2d 576 (5th Cir. 1987) (school teacher's college transcripts not constitutionally protected from disclosure). None of the documents submitted for our inspection contain the kind of personal information protected from disclosure by the constitutional right to privacy. See Open Records Decisions Nos. 583 (1990); 455 (1987) and authorities cited therein.

With respect to common-law privacy, the information is excepted from disclosure if (1) it contains highly intimate or embarrassing facts about a person's private affairs such that its publication would be highly objectionable to a person of ordinary sensibilities, and (2) it is not of legitimate public concern. Open Records Decision No. 579 (1990), and authorities cited therein. As the behavior of police officers on duty is of concern to the public, none of the information submitted for our inspection meets the test for exception from required public disclosure under common-law privacy. We note that the test for exception under section 3(a)(2) is identical to the test for exception under common-law privacy. Hubert v. Harte-Hanks Texas Newspapers, Inc., 652 S.W.2d 546 (Tex. App. - Austin 1983, writ ref'd n.r.e.).

With respect to your claim under section 3(a)(7), it is well established that a governmental body cannot close information by agreement. Open Records Decision No. 414 (1984); 283 (1981).

With respect to the balance of your your claim under section 3(a)(8), you have not advised that a criminal investigation is currently pending with respect to any of the requested information or shown how the release of the

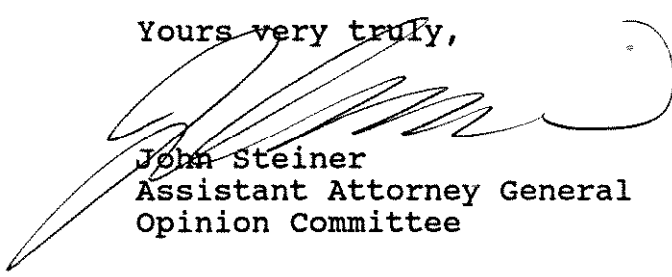
requested information would unduly interfere with law enforcement. Open Records Decision No. 553 (1990) and authorities cited therein.

Finally, we note that the materials submitted for our inspection contain information from polygraph examinations. Article 4413(29cc), section 19A, V.T.C.S. prohibits the release of information acquired from a polygraph examination except as specifically provided. You may not release information made confidential by art 4413(29cc), section 19A.

To summarize, you may withhold exhibit A and the marked portions of Exhibits C, E, F, H, J, K, L, and M under section 3(a)(11). You may withhold Exhibits G and F to the extent the prosecuting attorney determines the information should be withheld. The witness statement in Exhibits H and I may be withheld under the informer's privilege. Information made confidential by art. 4413(29cc), section 19A, must be withheld. The balance of the information must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR91-024.

Yours very truly,



John Steiner  
Assistant Attorney General  
Opinion Committee

JS/le

Ref.: ID# 9660, 9652

Enclosure: ORD Nos. 551, 583, 579, 553, 515, 455, 414, 283

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